



August 10, 1999

Ms. Belinda R. Perkins
Assistant General Counsel
Teachers Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR99-2256

Dear Ms. Perkins:

You have asked whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 126407.

The Teacher Retirement System of Texas ("TRS") received a request for a personnel file for a named individual. You indicate that much of the requested information has been provided to the requestor, but that the portions believed to be confidential have been withheld from disclosure. The records at issue were submitted to this office, marked to show the portions that you believe to be confidential. You assert that the marked information is protected from disclosure (1) under section 552.101 in conjunction with various other state and federal laws, (2) to protect the employee's common-law privacy interests under sections 552.101 and 552.102 of the Government Code, and (3) as provided by sections 552.024 and 552.117 of the Government Code. We will address your arguments against disclosure of information about the named employee and about other current or former public employees.

Information About the Named Employee

You assert that the records at issue contain information that implicates the common-law privacy interests of the named employee. The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no

legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). Information found in public employee personnel files that reveals personal financial information is usually excepted from public disclosure under the common-law privacy test, except to the extent that the information reflects a transaction between the employee and the public. Open Records Decision Nos. 600 (1992) (information about public employee's participation in a group insurance program, retirement benefits beneficiaries, tax exempt reimbursement accounts, and direct deposit), 545 (1990) (information about a public employee's participation in a deferred compensation plan).

Thus, information showing whether an employee is allocating part of his or her salary to various types of "flex" plans, which allow an employee to allocate his or her pre-tax compensation to certain benefit plans, is private financial information. Open Records Decision No. 600 at 11-12 (1992). Information showing whether an employee opts to have his or her paycheck deposited directly to a bank is also private. *Id.* Information about deferred investment programs and designation of beneficiaries of those programs must be withheld. Open Records Decision No. 545 (1990). Information concerning an employee's allocation of part of his or her salary to any voluntary investment program is private and may not be disclosed. Open Records Decision No. 600 at 11-12 (1992). Information about insurance coverage paid for entirely by an employee is excepted from disclosure, as is information about designated beneficiaries of those plans. *Id.* at 9-10. We have reviewed the financial information that you have marked as protected from disclosure under sections 552.101 and 552.102 of the Government Code. We agree that most of the marked information is private financial information that must be withheld from disclosure. The prior salary history of the applicant is not, however, protected by privacy and must be released. Open Records Decision No. 455 (1987). Additionally, the "net salary" amounts must be released. *See* Open Records Decision No. 600 (1992).

You also assert that certain financial information about the employee is confidential under section 825.507 of the Government Code in conjunction with section 552.101 of the Government Code. Section 552.101 of the Government Code provides that information is excepted from disclosure if it is "confidential by law, either constitutional, statutory, or by judicial decision." Section 825.507 provides for limited access to certain types of information held by TRS:

(a) Information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, beneficiary, or alternate payee is confidential under Section 552.101, and may not be disclosed in a form identifiable with a specific individual unless:

(1) the information is disclosed to:

(A) the individual or the individual's attorney, guardian, executor, administrator, conservator, or other person who the executive director determines is acting in the interest of the individual or the individual's estate;

(B) a spouse or former spouse of the individual if the executive director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(C) a governmental official or employee if the executive director determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee; or

(D) a person authorized by the individual in writing to receive the information; or

(2) the information is disclosed pursuant to a subpoena and the executive director determines that the individual will have a reasonable opportunity to contest the subpoena.

(b) This section does not prevent the disclosure of the status or identity of an individual as a member, former member, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

(c) The executive director may designate other employees of the retirement system to make the necessary determinations under Subsection (a).

(d) A determination and disclosure under Subsection (a) may be made without notice to the individual member, retiree, annuitant, beneficiary, or alternate payee.

We agree that the information concerning retirement contributions, which you have marked, is confidential under section 825.507 of the Government Code.

You also assert that an employment eligibility verification form and marked tax information are protected from disclosure under federal law in conjunction with section 552.101 of the

Government Code. The employment eligibility verification form, form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with applicable federal statutes and regulations governing the employment eligibility system. We also agree that you must withhold the marked tax return information under title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 at 8-9 (1992).

You have marked certain records that you believe may be withheld from disclosure under section 552.114 of the Government Code and the Family Educational Rights Act of 1974 (“FERPA”), title 20 of the United States Code, section 1232g. Section 552.114(a) provides for confidentiality of information in a student record at an educational institution funded by state revenue. Section 552.026 excepts education records from disclosure unless released in conformity with FERPA. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases identifying information in a minor student’s records without parental consent. 20 U.S.C. § 1232g(b)(1). Because TRS is not an educational agency or institution subject to section 552.114 or FERPA and does not maintain these records on behalf of such an agency or institution, these records are not confidential under FERPA or sections 552.026 and 552.114 of the Government Code.

You ask if the employee’s education records might be considered as confidential under the doctrine of constitutional privacy. We note that the scope of information considered private under the constitutional privacy doctrine is far narrower than that under the common-law privacy doctrine because the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). Information about the educational qualifications of a public employee is not protected from disclosure under either common-law or constitutional privacy. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in duties, qualifications of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

You also have marked as confidential the employee’s social security number and information concerning whether the employee has family members. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. As of the time of the request for information, the employee had opted in writing to have her social security number and information about family

members withheld from disclosure. Open Records Decision Nos. 530 at 5 (1989), 482 at 4 (1987), 455 (1987). We agree with your markings to protect this type of information from disclosure.

Information About Other Employees

The responsive information contains information about other employees that you indicate may be protected from disclosure under provisions of the Americans with Disabilities Act of 1990 (the "ADA") 42 U.S.C. § 12101 *et seq.*, because this information pertains to health conditions and was collected by TRS for work purposes. In Open Records Decision No. 641 (1996), this office determined that medical information obtained pursuant to the ADA is confidential under section 552.101 of the Government Code in conjunction with 42 U.S.C. § 12112. *See also* 29 C.F.R. § 1630.14(b)(1) (providing that medical information "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record").

Section 12112(d)(3)(B) of title 42 of the United States Code provides that information regarding medical condition or medical history may be disclosed as follows:

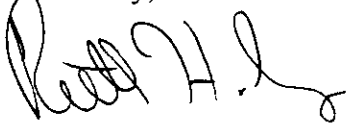
- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) government officials investigating compliance with this Act shall be provided relevant information on request.

These restrictions are applicable to information about medical conditions obtained from employees. 29 C.F.R. § 1630.14(c)(1)(i)-(iii). We have reviewed the information that you have marked as protected from disclosure under the ADA and agree that the marked information is confidential.

You also ask if the TRS is required to withhold from disclosure under section 552.117 information in a personnel file concerning other public employees not employed by TRS. You state that TRS "does not possess records that would allow it to promptly determine what elections employees of other agencies have made." As the marked information does not concern TRS employees nor does TRS represent that it holds the information on behalf of these individuals' employing agencies, we conclude that section 552.117 is not implicated in this situation.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 126407

Encl. Submitted documents

cc: Mr. Steve Lisson
Initiate !!
P.O. Box 2013
Austin, Texas 78768-2013
(w/o enclosures)